American Bar Association
www.supremecourtpreview.org

Nos. 07-1428 and 08-328

IN THE
Supreme Court of the United States

FRANK RICCI, ET AL., *Petitioners,*
v.
JOHN DESTEFANO, ET AL., *Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE STATES OF MARYLAND, ALASKA, ARKANSAS, IOWA, NEVADA, AND UTAH AS *AMICI CURIAE* SUPPORTING RESPONDENTS

DOUGLAS F. GANSLER
Attorney General of Maryland

AUSTIN C. SCHLICK
Counsel of Record
STEVEN M. SULLIVAN
JOSHUA N. AUERBACH
MICHELE J. MCDONALD
200 Saint Paul Pl., 20th Floor
Baltimore, MD 21202
(410) 576-7291

March 25, 2009

[Counsel Continued on Inside Cover]

RICHARD A. SVOBODNY
Acting Attorney General
of Alaska
P. O. Box 110300
Juneau, AK 99811

DUSTIN MCDANIEL
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 77201

TOM MILLER
Attorney General of Iowa
2nd Floor Hoover Building
Des Moines, IA 50319

CATHERINE CORTEZ MASTRO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Suite #230
P. O. Box 142320
Salt Lake City, UT 84114-2320

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PETITIONERS' CLAIMS REST ON FEARS ABOUT FUTURE DISCRIMINATION THAT ARE NOT JUSTICIABLE AT THIS TIME. 6

A. Petitioners Were Not Denied a Promotion. 6

B. Petitioners Lack Standing. 8

C. Petitioners' Claims Are Not Ripe. 10

II. ANTI-DISCRIMINATION RULES DO NOT IMPOSE LIABILITY ON A GOVERNMENT AGENCY THAT DEFERS TAKING FINAL ACTION IN ORDER TO RECONSIDER THE DESIGN OF A PERSONNEL SYSTEM. 11

A. A Decision To Defer Taking Employment Action Is Not an Adverse Employment Action Under Title VII. 12

B. New Haven Permissibly Considered Race, Without Subjecting Petitioners to Group-Based Treatment or a Disproportionate Burden. 15

III. STATES REQUIRE FLEXIBILITY IN THE DEVELOPMENT AND ADMINISTRATION OF THEIR PERSONNEL SYSTEMS AND OTHER PROGAMS. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 10-11

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)..... 9, 15, 16

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006)..... 6

Arendale v. City of Memphis, 519 F.3d 587 (6th Cir. 2008)..... 5

Benningfield v. City of Houston, 157 F.3d 369, (5th Cir. 1998)..... 14

Bowie v. Ashcroft, 283 F. Supp. 2d 25 (D.D.C. 2003)..... 13

Bragg v. Navistar Int'l Transp. Corp., 164 F.3d 373 (7th Cir. 1998)..... 14

Butler v. Alabama Dep't of Transp., 536 F.3d 1209 (11th Cir. 2008)..... 12

Byers v. City of Albuquerque, 150 F.3d 1271 (10th Cir. 1998)..... 9-10

Carlson v. Green, 446 U.S. 14 (1980) 6

Caver v. City of Trenton, 420 F.3d 243 (3d Cir. 2005)..... 14

City of Beaumont v. Spivey, 1 S.W.3d 385 (Tex. Ct. App. 1999) 23

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)..... 15-16

Connick v. Myers 461 U.S. 138 (1983) 1

Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008).....5

Department of Human Servs. v. May, 1 P.3d 159 (Colo. 2000) 22

Derrickson v. Circuit City Stores, Inc., 84 F. Supp. 2d 679 (D. Md. 2000).....13

Engquist v. Oregon Dep't of Agric., 128 S. Ct. 2146 (2008).....2

Gratz v. Bollinger, 539 U.S. 244 (2003) 16-18

Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964)..... 7-8

Griffin v. Potter, 356 F.3d 824 (7th Cir. 2004).....6

Grutter v. Bollinger, 539 U.S. 306 (2003) 16-18

Hancock v. Potter, 531 F.3d 474 (7th Cir. 2008).....14

Higgins v. Gonzalez, 481 F.3d 578 (8th Cir. 2007).....14

Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 755 (4th Cir. 1996).....14

In re Police Sergeant (PM3776V) City of Patterson, 819 A.2d 1173 (N.J. 2003).....23

Jones v. City of Springfield, 554 F.3d 669 (7th Cir. 2009)..... 22-23

Johnson v. Transportation Agency, 480 U.S. 616 (1987).....17

Katz v. Hoberman, 272 N.E.2d 81 (N.Y. 1971) 24

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 25

Locke v. Gas Research Institute, 935 F. Supp. 994 (N.D. Ill. 1996) 13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....5, 9

Mangan v. New York State Civil Serv. Comm'n, 303 N.Y.S.2d 113 (N.Y. 1969).....24

Meana v. Morrison, 329 N.E. 2d 535 (Ill. App. Ct. 1975)..... 23-24

Miller v. Johnson, 515 U. S. 900 (1995) 15

New York State Law Enforcement Officers v. New York State Office of Mental Health, 668 N.Y.S.2d 337 (N.Y. 1998).....23

Nichols v. Southern Ill. Univ.-Edwardsville, 510 F.3d 772 (7th Cir. 2007) 12-13

Northeastern Fla. Chapter Associated Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993).....9

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U. S. 701, 127 S. Ct. 2738 (2007)..... 15-20

Patterson v. Johnson, 505 F.3d 1296 (D.C. Cir. 2007)..... 12

Petru v. City of Berwyn, 872 F.2d 1359 (7th Cir. 1989)..... 23

Power v. Summers, 226 F.3d 815 (7th Cir. 2000)..... 5

Raines v. Byrd, 521 U.S. 811 (1997)..... 5, 10

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)..... 16-17

Rogers v. Alternative Res. Corp., 440 F. Supp. 2d 366 (D.N.J. 2006)..... 13

Rogers v. Delaware Dep't of Pub. Safety/DMV, 541 F. Supp. 2d 623 (D. Del. 2008)..... 23

Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000)..... 14

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)..... 5

Steelworkers v. Weber, 443 U.S. 193 (1979)..... 2

Sullivan v. River Valley School Dist., 197 F.3d 804 (6th Cir. 1999)..... 14

Texas v. United States, 523 U.S. 296 (1998)..... 10-11

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) 2

Vermont State Employee Ass'n, Inc. v. Vermont Criminal Justice Training Council, 704 A.2d 769 (1997) 22

Waters v. Churchill, 511 U.S. 661 (1994) 22

Worth v. Jackson, 451 F.3d 854 (D.C. Cir. 2006) 9, 11

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 18

OTHER AUTHORITIES

Min-Hsiung Huang, "Race of the Interviewer and the Black-White Test Score Gap," 38:1 *Social Science Research* 29-38 (March 2009) 24

INTEREST OF *AMICI CURIAE*

State and local governments employ more than 19 million public servants, of whom more than 5 million are State employees. *See* U.S. Census Bureau, *Federal, State, and Local Governments: Public Employment and Payroll Data*, Table 443, http://www.census.gov/govs/www/apes.html. As a major public employer, each State has an interest in maintaining the fairness and integrity of government employment practices, not only for the benefit of its employees, but also to earn and retain the trust of the public. *See Connick v. Myers* 461 U.S. 138, 150-51 (1983) (noting government's legitimate interest in "the effective and efficient fulfillment of its responsibilities to the public" and the promotion of "integrity in the discharge of official duties") (citation omitted).

Petitioners advance a novel proposition that, if adopted by the Court, would substantially impair that important governmental interest. Under Petitioners' theory, a public employee who receives a passing score on an eligibility test for a promotion thereby acquires a legally protected interest and potentially could prevent the government from deferring final action on the promotion for any of a variety of reasons. Such a rule would be a dramatic departure from the established law of employment discrimination. Its detrimental implications, moreover, could extend beyond personnel decisions to encompass other responsibilities of State government.

Each State must be able to evaluate its policies and programs in response to public (or intra-governmental) concerns, including concerns that such

policies or programs would violate federal law, and to make changes or corrections as necessary. Here, the perceived need for reconsideration of a promotional test involved personnel policies, but a similar necessity for remedial or prophylactic measures may arise in connection with a public procurement process or an agency rulemaking, for example.

Title VII "was not intended to 'diminish traditional management prerogatives'" in the manner that Petitioners suggest. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). The Equal Protection Clause likewise "does not require '[t]his displacement of managerial discretion by judicial supervision.'" *Engquist v. Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2157 (2008) (citation omitted). Amici States have a strong interest in the rule that neither Title VII nor the Equal Protection Clause prevents the government from treating all applicants for promotion equally, as New Haven did by deferring promotions in its fire department pending further consideration.

SUMMARY OF ARGUMENT

This case arises from the decision of the New Haven Civil Service Board, as a result of a tie vote among its members, not to certify the results of a promotional examination. If the test results had been certified, Petitioners would have been eligible for, but not entitled to, a promotion to the positions of captain or lieutenant in the New Haven Fire Department. The two board members who voted against certification stated, in casting their votes, that they were concerned about flaws in the examination

process and potential disparate impact liability under Title VII. The board's split decision on certification did not classify any candidate by race or adopt a system of racial classification for the making of promotions. The board's decision also did not result in any candidate being promoted, denied a promotion, or rendered ineligible for promotion.

Although the lower courts correctly recognized the limited nature of the decision at issue here, those courts did not fully consider whether the Civil Service Board's decision resulted in cognizable harm to Petitioners or constituted an "adverse employment action." Petitioners can satisfy neither of those requirements.

1. Petitioners lack standing to challenge the board's decision because that decision did not impose on them any concrete, particularized harm. Petitioners' anticipatory challenge to a *de facto* racial quota is not ripe; there is no evidence that any such quota has been adopted explicitly or implicitly, by the Civil Service Board or anyone else.

2. For similar reasons, the board's decision was not an adverse employment action. The decision did not, as Title VII requires, effectuate any material change in Petitioners' "compensation, terms, conditions, or privileges of employment." *See* 42 U.S.C. 2000e-2(a)(1).

Although the board's failure to certify the test results was "race-conscious" in the sense that some board members sought to avoid an unlawful racially disparate impact on the pool of eligible candidates, the decision did not result in the adoption of any racial classification and therefore does not trigger the application of strict scrutiny. A government agency's decision to put scheduled civil service promotions on

hold, so that it can consider whether its procedure for making the promotions would subject it to liability or whether a different procedure would yield greater racial diversity in its supervisory ranks, falls well within the range of race-conscious measures that this Court has recognized as lawful.

3. As a practical matter, governments implementing complex administrative processes should be afforded wide latitude to pause and to start over. In matters of hiring and promotion, for example, notwithstanding government employers' determined efforts to prevent discrimination or other unfairness, social scientists have yet to agree upon a fool-proof method of detecting or eliminating all of the racial or cultural bias that may be encoded in a given set of examination questions or procedures. States and other government entities must be afforded sufficient flexibility to anticipate and respond to legitimate concerns about the fairness of an ongoing promotion process, *before* concerns about a possible disparate impact become a reality, and thereby become more difficult and costly to remedy.

Moreover, government decision-makers should not be subjected to a risk of liability that encourages them to conceal their true reasons for reconsidering or changing course. Citizens rightly demand transparency when, for example, the government engages in civil service hiring, in procurement, or in the promulgation of regulations. Penalizing a government that decides to start over, or merely pauses, in implementing such processes would discourage deliberation and transparency. Because a decision to start over or pause generally does not impose any concrete harm on anyone, a judicial challenge to such a decision ordinarily should not lie.

ARGUMENT

Article III of the Constitution requires that a party invoking federal court jurisdiction must allege an "actual or imminent" injury, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that is "personal, particularized, concrete, and otherwise judicially cognizable," *Raines v. Byrd*, 521 U.S. 811, 820 (1997). To the same effect, a claim for disparate treatment is cognizable under Title VII only if the plaintiff can show that he was subjected to an adverse employment action—a material change in the plaintiff's "compensation, terms, conditions or privileges of employment." *See* 42 U.S.C. 2000e-2(a)(1). In employment-discrimination cases brought pursuant to 42 U.S.C. § 1983, an adverse employment action likewise is generally recognized as a requisite element of a claim. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n.1 (1993); *see also Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008); *Arendale v. City of Memphis*, 519 F.3d 587, 602-03 (6th Cir. 2008); *but see Power v. Summers*, 226 F.3d 815, 820-21 (7th Cir. 2000) (no adverse employment action required to state First Amendment claim for retaliation).

These basic principles have yet to be applied in earnest to Petitioners' case. The lower courts cursorily addressed the issue of standing, *see* Pet. App. 44a-45a, did not discuss ripeness, and never determined whether the requirement of an adverse employment action was satisfied, Pet. App. 19a. In fact, there was no judicially cognizable harm to Petitioners, nor any adverse employment action. Petitioners therefore lack standing to challenge the municipal decision at issue in this case; their claims

of racial discrimination in employment are not ripe; and they cannot state a claim under Title VII or the Equal Protection Clause.[1]

I. PETITIONERS' CLAIMS REST ON FEARS ABOUT FUTURE DISCRIMINATION THAT ARE NOT JUSTICIABLE AT THIS TIME.

A. Petitioners Were Not Denied a Promotion.

The governmental decision challenged in this case is a March 18, 2004 decision of the New Haven Civil Service Board not to certify the results of a fire department promotional examination. On a motion to certify the results, the board deadlocked, with two in favor, two against, and one member not voting. One of the two board members who voted not to

---

[1] The issues of standing and ripeness are jurisdictional in nature and should be addressed by this Court *sua sponte*. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006). If the Court nevertheless reaches the merits, the Court has discretion to consider whether the board decision at issue here was an adverse employment action, even though the issue was not litigated below. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Because the lack of an adverse employment action is closely related to the jurisdictional issues, fundamental to the unavailability of any right of action under Title VII in this case, and susceptible of resolution on the present record, the Court should exercise its discretion to affirm on this alternative ground. *See, e.g.*, *Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004) (in Title VII case, affirming summary judgment for Postal Service on alternative ground, not reached by trial court, that there was no adverse employment action).

certify, Malcolm Webber, indicated that he "originally was going to vote to certify," but live testimony before the board gave him "great doubts about the test itself." Pet. App. 586a. Mr. Webber stated that "I will vote No on this motion in order to move forward a deeper research and a complete study of how we're giving these exams because of the complete and rather horrifying disparate result of this particular examination." Pet. App. 586a-87a. Zelma Tirado, who also voted not to certify, concluded after hearing the testimony that both the process and the test were flawed. Pet. App. 587a. The board's chair, Jim Segaloff, expressed similar concerns about the disparate impact of the exam but ultimately voted to certify, indicating that he was not persuaded "that there's going to be an exam designed that's going to be less discriminatory." Pet. App. 587a-88a.

As a result of the Civil Service Board's two-to-two vote, no firefighter was deemed eligible for promotion, and no one was promoted. The Board's vote did not deny a promotion to any of the Petitioners, nor did it render any Petitioner ineligible for promotion. The only effect of the vote was, as board member Webber indicated, to afford the city an opportunity "to move forward a deeper research and a complete study of how we're giving these exams." Pet. App. 586a.

Notwithstanding Petitioners' metaphors about "rolling the dice over and over again," Pet. Br. at 31, and "perennial mulligan right[s]," Pet. Br. at 63, this case actually involves an agency decision to defer the making of promotions on one occasion, because of concerns about liability for the racially disparate impact of the process the agency had created to identify candidates for promotion. This is not a case like *Griffin v. School Board of Prince Edward County*,

377 U.S. 218 (1964), in which a government entirely shut down a program in order to avoid desegregation and instead contributed public funds to a racially segregated private program. The Civil Service Board simply decided, by a tie vote, to defer making promotions while it grappled with the fact that potential flaws and inaccuracies in its examination could have resulted in an overwhelmingly white class of eligible candidates.

The record does not reflect any decision by New Haven as to how it ultimately will proceed to make promotions. There is no evidence that New Haven will employ a racial classification at that time. Every Petitioner apparently remains eligible to compete for any promotion, and there is no basis for speculating that promotions will be offered on anything other than a lawful basis.

Furthermore, the burden imposed on Petitioners by the Civil Service Board's non-certification could amount, *at most*, to a requirement that they take some additional step to remain candidates for promotion. The board's decision may impose no burden on Petitioners other than delay, inasmuch as New Haven might yet decide to deem some or all of the Petitioners eligible for promotion without asking anything further of them.

B. Petitioners Lack Standing.

At an "irreducible constitutional minimum," a plaintiff invoking federal court jurisdiction "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560;

see also Raines, 521 U.S. at 820 ("personal, particularized, concrete, and otherwise judicially cognizable"). The Court thus held in *Adarand Constructors, Inc. v. Peña* that a subcontractor had standing to challenge a governmental incentive for hiring minority subcontractors because the racial classification at issue "prevent[ed] the plaintiff from competing on an equal footing." 515 U.S. 200, 210-12 (1995) (quoting *Northeastern Fla. Chapter Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 667 (1993)).

As the D.C. Circuit has correctly recognized, there is a critical distinction between *actual* harm arising from an employer's decision to adopt an allegedly unconstitutional racial classification and *conjectural* harm arising from an employer's decision to do nothing. "Under *Adarand* . . . , the relevant consideration is whether the agency is sufficiently committed to a particular race-conscious policy that the plaintiff will likely face a career impediment." *Worth v. Jackson*, 451 F.3d 854, 859 (D.C. Cir. 2006); *see id.* at 860 (white male employee lacked standing to bring employment discrimination claim where there was "no statute, regulation, or written policy committing HUD to favoring minorities or women," and where employee "may never have to compete at a disadvantage for a new position").

For similar reasons, as the Tenth Circuit has recognized, an employer's alteration of a promotional process, even if for race-conscious reasons, does not result in a denial of an opportunity to "compete[] on an equal footing" under *Adarand* and *Associated General Contractors* if, as in this case, the alterations apply equally to everyone. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1275-76 (10th Cir. 1998)

(white male police officers lacked standing to challenge city's assertedly race-conscious decision to lower threshold scores and cut-offs in promotional process, where decision to lower thresholds applied equally to all candidates and benefited both white and minority candidates).

The Civil Service Board's decision not to certify the results of the promotional exam entailed no commitment to making race-conscious promotions. The board's deferral of promotions applied equally to all candidates and did not deny anyone an opportunity to compete on an equal footing. Any injury Petitioners suffered as a result of the board's split vote was neither concrete, nor particularized to them. Accordingly, there is no federal court jurisdiction to consider Petitioners' challenge to the decision.

C. Petitioners' Claims Are Not Ripe.

Petitioners may not at this time challenge a feared *future* decision by the board to adopt a racial classification in the promotional process. Ripeness doctrine "protect[s government] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Petitioners anticipate that, when New Haven actually makes its next round of promotions to supervisory positions, they will not be permitted to

compete on an equal footing for those promotions. Petitioners repeatedly predict that the Civil Service Board's decision to defer the promotions will evolve into "a racial quota, reserving an easily determinable number of promotion slots for African-Americans." Pet. Br. at 61; *see also* Pet. Br. at 20 ("racial quotas"), 26 ("race-balancing quota"), 31 ("de facto quotas"). These are precisely the types of predictions that do not give rise to a ripe controversy.

Even if—contrary to all indications in the record—New Haven officials secretly plan to adopt a racial quota when the City ultimately makes firefighter promotions, no such decision has been "formalized," nor have the effects of such a decision been "felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-49. The unconstitutional discrimination that Petitioners predict "may not occur as anticipated," and "indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300; *see also Worth*, 451 F.3d at 861-62 (employee's challenge to alleged policy of favoring minorities and women in hiring and promotion, "absent concrete application of that policy," was not ripe for review). Petitioners' fears, however sincere, are not justiciable.

II. ANTI-DISCRIMINATION RULES DO NOT IMPOSE LIABILITY ON A GOVERNMENT AGENCY THAT DEFERS TAKING FINAL ACTION IN ORDER TO RECONSIDER THE DESIGN OF A PERSONNEL SYSTEM.

In this case, substantive law reinforces jurisdictional requirements. Even if Petitioners had standing (which they do not) and their case were ripe (which it is not), they have not stated a discrimination

claim under Title VII or the Equal Protection Clause of the Fourteenth Amendment.

A. A Decision To Defer Taking Employment Action Is Not an Adverse Employment Action Under Title VII.

The Civil Service Board's two-to-two vote on certifying the results of the promotional examination was not an adverse employment action and would not be treated as one under the decisions of any federal circuit.

An adverse employment action means "a *significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Patterson v. Johnson*, 505 F.3d 1296, 1298 (D.C. Cir. 2007) (emphasis added); *see Butler v. Alabama Dep't of Transp.*, 536 F.3d 1209, 1215 (11th Cir. 2008) ("a serious and material change in the terms, conditions, or privileges of employment"). "[T]he employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Butler*, 536 F.3d at 1215.[2]

---

[2] The Seventh Circuit, for example, has recognized "three general categories of actionable, materially adverse employment actions": (1) cases, including termination, in which the employee's "compensation, fringe benefits, or other financial terms of employment are diminished"; (2) cases involving a transfer in which the employee's career prospects are "likely to be stunted"; and (3) cases involving

The lower courts have addressed, and declined to classify as an adverse employment action, the sort of inconvenience that the board's decision imposes on Petitioners. In particular, the lower courts have rejected claims of an adverse employment action for "failure to promote" where, as here, the employer did not promote anyone, but instead deferred the plaintiff's prospects for promotion. *See, e.g.*, *Derrickson v. Circuit City Stores, Inc.*, 84 F. Supp. 2d 679, 694 (D. Md. 2000); *Locke v. Gas Research Institute*, 935 F. Supp. 994, 1002 (N.D. Ill. 1996); *cf. Rogers v. Alternative Res. Corp.*, 440 F. Supp. 2d 366, 372-73 (D.N.J. 2006) (under New Jersey Law Against Discrimination).

Although Petitioners repeatedly claim they were "denied [a] promotion," Pet. Br. at 3, 25, 43, no denial occurred in the relevant sense: Petitioners were not denied a promotion that their employer actually made or offered to someone else, where the successful and unsuccessful candidates were treated differently because of race. *See also Bowie v. Ashcroft*, 283 F. Supp. 2d 25, 31 (D.D.C. 2003) ("When a government agency cancels a vacancy announcement and no one outside the protected class is hired to fill the position, the plaintiff cannot establish her prima facie case.").

Even if Petitioners ultimately are required to take another test to remain eligible for promotion, such a requirement likewise would not constitute actionable harm. The courts of appeals uniformly hold that an employer's decision to require an employee to take a

---

subjection to "humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration" in the employee's "workplace environment." *Nichols v. Southern Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007).

test is not an adverse employment action. *See, e.g.*, *Hancock v. Potter*, 531 F.3d 474, 479-80 (7th Cir. 2008) (physical fitness-for-duty test); *Caver v. City of Trenton*, 420 F.3d 243, 256 (3d Cir. 2005) (psychological examination); *Schoffstall v. Henderson*, 223 F.3d 818, 825 (8th Cir. 2000) (fitness-for-duty examination); *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 814 (6th Cir. 1999) (mental and physical examinations); *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998) (psychological testing); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996) (same).

Even where an employee alleged that a performance examination was administered under discriminatory conditions, the Seventh Circuit declined to hold that the examination requirement was an adverse employment action subject to scrutiny for a racially discriminatory motive. *See Bragg v. Navistar Int'l Transp. Corp.*, 164 F.3d 373, 376-78 (7th Cir. 1998) ("a supervisor's assessment of an employee's skills is not an adverse employment action").

The inconvenience Petitioners suffered in having to study for the promotional test is, moreover, even less than the inconvenience of other employer-imposed burdens, such as a transfer to another city, that generally do not rise to the level of an adverse employment action. *See, e.g.*, *Higgins v. Gonzalez*, 481 F.3d 578, 587 (8th Cir. 2007).

B. New Haven Permissibly Considered Race, Without Subjecting Petitioners to Group-Based Treatment or a Disproportionate Burden.

In addition to falling short of an actionable employment decision, New Haven's decision not to certify the results of the promotional exam presents the sort of policy determination that this Court has found substantively consistent with anti-discrimination guarantees. As the District Court found, "all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion." Pet. App. 39a. Furthermore, under New Haven's civil service rules, no test-taker gained any legally protected interest in a promotion as a result of scoring well on the test. Pet. App. 42a. On these facts, no promotion-seeker suffered the sort of individualized harm that defines an equal protection or Title VII violation under this Court's cases.

Anti-discrimination rules "protect *persons*, not *groups*." *Adarand Constructors*, 515 U.S. at 227 (emphasis in original); *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U. S. 701, 127 S. Ct. 2738, 2757 (2007) (plurality opinion) ("[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U. S. 900, 911 (1995)); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Kennedy, J., concurring) ("The relevant proposition is not that it was blacks, or

Jews, or Irish who were discriminated against, but that it was individual men and women.").

Anti-discrimination protections thus are triggered when a particular individual "is disadvantaged by the government because of his or her race." *Adarand*, 515 U.S. at 230. In other words, the protections take hold when a racial classification "helps" members of one race and "hurts" members of another. *Id.* at 241 n.* (Thomas, J., concurring in part and concurring in the judgment); *see also Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2751 (strict scrutiny applies "when the government distributes burdens or benefits on the basis of individual racial classifications").

Even if a racial classification causes individualized injury, moreover, the government's program may be lawful in its full context. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). Specifically, the Court has found unacceptable those racial classifications that foreclose "individualized consideration" of personal qualifications, while approving race-conscious approaches that leave room for individualized consideration. The construction set-aside in *Croson*, for example, failed the narrow-tailoring requirement of strict scrutiny because "a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race." 488 U.S. at 508.

Similarly, in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court drew upon Justice Powell's principal opinion in *Bakke* when emphasizing "the importance of considering each particular applicant as an individual, assessing all of the qualities the

individual possesses." *Id.* at 271 (discussing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). The numbers-based undergraduate admissions plan in *Gratz* failed Fourteenth Amendment scrutiny precisely because it did "not provide such individualized consideration." 539 U.S. at 271.

In *Grutter*, by contrast, the University of Michigan Law School's lawful admissions program gave "some attention to numbers" in the selection process, but "remain[ed] flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. at 336 (internal quotation marks omitted), 337.

So too, in the employment area, this Court upheld a female worker's selection for promotion to a dispatcher position under an affirmative action plan that required female employees "to compete with all other qualified applicants. *No* persons are automatically excluded from consideration: *all* are able to have their qualifications weighed against those of other applicants." *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

These decisions show that there is no *per se* prohibition on considering race somewhere in the course of a governmental process: What matters is that the affected individual must have a real chance to obtain the desired government benefit on his or her own merits. *Compare Grutter*, 539 U.S. at 339 (rejecting view that race may never be "outcome determinative"), *and Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2753 ("The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was

indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance."), *with Gratz*, 539 U.S. at 274 (individualized review was "the exception and not the rule" and came only after race had been applied as "a decisive factor for virtually every minimally qualified underrepresented minority applicant"), *and id.* at 280 (O'Connor, J., concurring) (deeming individualized consideration "necessary" and noting that "the current [undergraduate selection] system . . . is a nonindividualized, mechanical one").

The nature of the challenged governmental action also factors into the equation. Of direct relevance here, the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), distinguished between the impermissible plans for laying off teachers that were at issue in that case, and the "valid *hiring* goals" that had been approved in earlier cases. *Id.* at 282 (plurality opinion) (emphasis in original). Hiring goals, the plurality stated, "simply do not impose the same type of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.* at 282-83; *see id.* at 283 ("While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.") (footnote omitted). *Cf. Seattle Sch. Dist. No. 1*, 127 S. Ct. at 2794 (Kennedy, J., concurring) (distinguishing mandatory public school assignments from "the context of college admissions where students had other choices").

By all these measures, New Haven's refusal to certify the firefighter test results does not constitute

unlawful discrimination. No firefighter lost a job to achieve race-conscious objectives. No individual suffered a special disability or stigma as a result of New Haven's decision. No one was subjected to a quota system or denied individualized consideration in a final selection process. Petitioners might still secure the promotions they seek. The Civil Service Board simply decided that, for the moment, there would not be promotions for anyone.

The opinions in *Seattle School District No. 1* highlight the difference between the facts here, and facts that would constitute unlawful discrimination. Writing for the plurality, the Chief Justice emphasized in the *Seattle* case that it is not necessarily an equal protection violation for a local government to take steps that "avoid racial imbalance," particularly where, as here, the government eschews incorporating "express racial classifications" into its programs. 127 S. Ct. at 2762 n.16 (discussing *School Comm. of Boston v. Board of Educ.*, 352 Mass. 693, 227 N. E. 2d 729 (1967), *appeal dismissed*, 389 U. S. 572 (1968) (per curiam)).

In his concurring opinion, Justice Kennedy likewise was clear that the material question was "how decisions based on an individual student's race are made." 127 S. Ct. at 2792 (Kennedy, J., concurring). "In the administration of public schools by the state and local authorities," Justice Kennedy wrote, "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Id.* Schools concerned about unequal educational opportunity, he continued, "are free to devise race-conscious measures to address the problem in a general way and without treating each

student in different fashion solely on the basis of a systematic, individual typing by race." *Id.* Permissible measures would include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* "These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Id.*

Here, in order to avoid potential liability under Title VII for disparate impact, the Civil Service Board acted "in a general way and without treating each [firefighter] in different fashion solely on the basis of a systematic, individual typing by race." *Id.* The decision is akin to rejecting a proposed new school location, when building on the proposed site would worsen, rather than improve, an existing racial disparity within a public school system. This Court has never read either the Equal Protection Clause or Title VII as forbidding state and local governments from making these sorts of commonsense decisions.[3]

---

[3] Petitioners cite no authority for their assertion that, under Title VII, making a decision for reasons "related to race" is "direct evidence" of an "impermissible racial motive." Pet. Br. at 48-49. Petitioners can characterize a desire to avoid a disparate impact as "direct evidence" of intentional racial discrimination only because, in their view, such a desire *is* intentional racial discrimination. Petitioners' view, however, makes no sense. Title VII proscribes *both* disparate treatment *and* disparate impact.

Congress surely did not intend that efforts by an employer to avoid liability under one section of the statute would serve as "direct evidence" of liability under another section.

Amici States agree with the position of the United States that strict scrutiny would apply to the Civil Service Board's decision (assuming for purposes of argument that Petitioners had standing to challenge it) only if there were evidence that the reason given by two board members for voting against certification was a pretext for racial discrimination against white candidates. Similarly, Respondents would be liable under Title VII (assuming for purposes of argument that they took an adverse employment action) only if the reason given by the board members was pretextual. Yet the Amici States do not agree with the Solicitor General's suggestion that a remand is required. On summary judgment, Rule 56 required Petitioners to do more than insinuate that some dynamic of "racial politics" caused two board members to vote against certification. *See* Pet. Br. at 31, 61. Because Petitioners presented no evidence that the reason given by the two board members was a pretext, the District Court correctly granted summary judgment for Respondents.

III. STATES REQUIRE FLEXIBILITY IN THE DEVELOPMENT AND ADMINISTRATION OF THEIR PERSONNEL SYSTEMS AND OTHER PROGRAMS.

Permitting an employee to challenge policy decisions that do not materially alter the terms or conditions of his employment would not significantly advance equal opportunity in the workplace. But it would significantly impair the ability of public employers to manage the workplace.

Safeguarding public employers' freedom to cancel actions and "start over" promotes the effectiveness and efficiency of government. *See Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion) ("Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible."); *see generally Department of Human Servs. v. May*, 1 P.3d 159 (Colo. 2000) ("[T]he overarching purpose of the state personnel system is 'to assure that a well-qualified work force is serving the residents of Colorado.'"); *Vermont State Employee Ass'n, Inc. v. Vermont Criminal Justice Training Council*, 704 A.2d 769, 773 (1997) ("The historical . . . purpose of the civil service and its merit system principles is to insulate the state work force from political influence so as to improve the effectiveness and efficiency of state government.").

In particular, there are many valid reasons why a government employer may wish to cancel or revise a personnel program or personnel process. Financial considerations may come into play. The employer may need to "eliminate a position instead of promoting an officer into it . . . in order to

redistribute departmental funding." *Jones v. City of Springfield*, 554 F.3d 669, 673 (7th Cir. 2009). Or the employer may decline to make an appointment from an eligibility list due to a "depleted financial situation," *Petru v. City of Berwyn*, 872 F.2d 1359, 1365 (7th Cir. 1989), or fail to create new positions due to a general hiring freeze, *Rogers v. Delaware Dep't of Pub. Safety/DMV*, 541 F. Supp. 2d 623, 628 (D. Del. 2008). *See also, e.g., New York State Law Enforcement Officers, v. New York State Office of Mental Health*, 668 N.Y.S.2d 337 (N.Y. 1998) (upholding decision of correctional psychiatric center not to fill vacant managerial position due to downsizing and layoffs, despite available eligible list).

A "breather" or "do-over" likewise may be advisable in light of external constraints that previously had been overlooked or misunderstood, or that arose during the course of the governmental deliberations. *See Petru*, 872 F.2d at 1365 (standstill agreement with U.S. Department of Justice concerning hiring of firefighters).

A decision to correct error by starting over breaks no new ground in the civil service area. Government agencies have often taken this approach after losing confidence in a civil service selection process. *E.g.*, *In re Police Sergeant (PM3776V) City of Patterson*, 819 A.2d 1173, 1182 (N.J. 2003) (make-up examination voided based on evidence that unknown individuals disseminated exam questions and answers throughout police department); *City of Beaumont v. Spivey*, 1 S.W.3d 385 (Tex. Ct. App. 1999) (appointment of police officer who cheated on civil service examination voided); *Meana v. Morrison*, 329 N.E.2d 535, 540 (Ill. App. Ct. 1975) (examination voided and eligibility list cancelled where some

candidates were permitted to use slide rules and calculators and others were not); *Katz v. Hoberman*, 272 N.E.2d 81 (N.Y. 1971) (promotional exam cancelled after agency used exam questions already made public); *Mangan v. New York State Civil Serv. Comm'n*, 303 N.Y.S.2d 113, 114 (N.Y. 1969) (results of promotional examination cancelled based on unfair advantage from access to re-used exam questions).

There is a need for deliberate action in a case such as this. Notwithstanding government employers' determined efforts to prevent discrimination or other unfairness in hiring and promotion, social scientists have yet to agree upon a fool-proof method of detecting or eliminating all of the racial or cultural bias that may be encoded in a given set of examination questions or procedures. For instance, a recent study found that the results of a standardized test may be affected by the race of the person administering the test. *See* Min-Hsiung Huang, "Race of the Interviewer and the Black-White Test Score Gap," 38:1 *Social Science Research* 29-38 (March 2009). As the district court concluded, "the reasons for testing disparities remain elusive." Pet. App. 34a. Particularly in this uncertain area of government administration, States and other government entities must be allowed the flexibility they need to anticipate and respond to legitimate concerns about the fairness of an ongoing promotion process, *before* concerns about a possible disparate impact become a reality, and thereby become more difficult and costly to remedy.

Imposing liability in cases such as this might drive government decision-making underground. Here, the Civil Service Board, an independent decision-making body, rendered its decision after five

public hearings at which testimony and public comment were taken. Each board member explained his or her vote on the record. The present lawsuit resulted, in large part, from the highly public nature of the board's deliberations and decision. Had the decision to pause and reconsider the promotional examination been made by city personnel administrators, rather than by an independent board, and had the decision been made in private, rather than in public hearings, Petitioners likely would not have brought a lawsuit until some concrete action by the City appeared to foreclose their chance at promotion.

If the Court were to subject government agencies to suit under the circumstances of this case—where no final decision is close to being made, but an intermediate decision was rendered through a highly public process—that outcome would discourage the kind of open process that occurred here. In personnel matters, in procurement, and in the promulgation of regulations, among other areas, government would have a new incentive to make intermediate decisions behind closed doors and to withhold the reasons for those decisions. That would not serve the public interest, nor would it benefit those who do business with the government.

Voluntary compliance is the "preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986). Consistent with this rule, public employers historically have been allowed the flexibility to design personnel programs and make promotional and hiring decisions that *both* achieve equal employment opportunity, *and* further the integrity, efficiency, and transparency of government

operations. Petitioners ask this Court to deny New Haven that needed flexibility and, instead, to intervene in the Civil Service Board's promotional program in a manner that would discourage state and local governments from improving their own administrative processes or, at a minimum, from disclosing the true reasons for improvements. Petitioners' suggested approach would render equal opportunity and good government competing, rather than complementary, objectives. This Court should decline Petitioners' ill-considered invitation.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

RICHARD A. SVOBODNY
Acting Attorney General
of Alaska
P. O. Box 110300
Juneau, AK 99811

DUSTIN MCDANIEL
Attorney General
of Arkansas
200 Tower Building
323 Center Street
Little Rock, AR 77205

CATHERINE CORTEZ MASTRO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

TOM MILLER
Attorney General of Iowa
2nd Floor Hoover Building
Des Moines, IA 50319

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol Suite #230
P. O. Box 142320
Salt Lake City, UT 84114-2320

DOUGLAS F. GANSLER
Attorney General
of Maryland

AUSTIN C. SCHLICK
Counsel of Record
STEVEN M. SULLIVAN
JOSHUA N. AUERBACH
MICHELLE M. MCDONALD
200 St. Paul P., 20th Floor
Baltimore, MD 21202
(410) 576-6324

Counsel for Amici Curiae

March 25, 2009